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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

RAYMOND ANGULO, JR.,

Defendant and Appellant.

E069943

(Super.Ct.No. RIF1508081)

OPINION

APPEAL from the Superior Court of Riverside County. Thomas E. Kelly, Judge.
(Retired judge of the Santa Cruz Super. Ct. assigned by the Chief Justice pursuant to
art. VI, § 6 of the Cal. Const.) Affirmed with directions.

David P. Lampkin, under appointment by the Court of Appeal, for Defendant and
Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Minh
U. Le, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Raymond Angulo, Jr., guilty of two counts of resisting an officer by force or violence (Pen. Code,¹ § 69, counts 1 & 2), two counts of assault by means likely to produce great bodily injury upon a peace officer (§ 245, subd. (c), counts 3 & 4), and attempting to take a weapon from an officer while resisting arrest (§§ 664, 148, subd. (b), count 6). As to count 2, the jury found true the allegation that defendant personally inflicted great bodily injury upon an officer. (§§ 12022.7, subd. (a), 1192.7, subd. (c)(8).) In a bifurcated hearing, defendant admitted the allegations that he had served six prior prison terms (§ 667.5, subd. (b)), had two prior strike convictions (§§ 667, subds. (c) & (e)(2)(A), 1170.12, subd. (c)(2)(a)), and had two prior serious felony convictions (§ 667, subd. (a)). A trial court sentenced him to the determinate term of 12 years eight months and the indeterminate term of 78 years to life.

On appeal, defendant claims the trial court committed reversible error in denying his *Marsden*² motion without giving him an opportunity to state his reasons for wanting substitute counsel. He also contends the matter should be remanded for resentencing pursuant to Senate Bill No. 1393 (2017–2018 Reg. Sess.) (SB 1393). We agree that the matter should be remanded for resentencing. In all other respects, we affirm the judgment.

¹ All further statutory references will be to the Penal Code, unless otherwise noted.

² *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

FACTUAL BACKGROUND³

The police received a call regarding a man looking into a residence and trying to enter it. An officer arrived at the scene and saw defendant, who matched the description. He talked to defendant and found out he was on parole. Another officer arrived, and the two officers approached defendant together. They asked him to stand up, turn around, and put his hands behind his back. Defendant initially complied, but then suddenly pulled away and started running. He reached a gate that was closed, so he turned around, rushed toward one of the officers, and punched and kicked him. The other officer used his taser gun on defendant, but it was ineffective, so he tried to physically restrain defendant to gain compliance. Defendant actively fought the officers. A third officer responded to the scene and joined the other officers in trying to restrain him. Defendant continued to resist. The third officer drew his taser gun, but by then, defendant was on the ground and had stopped moving. A few seconds later, more officers arrive and handcuffed him.

Videos of the altercation were recorded by the officers' dash cameras. The videos were played for the jury at trial.

³ Because the facts of the case are not relevant to the issue on appeal, we will only give a brief statement of the facts.

ANALYSIS

I. Defendant Did Not Clearly Indicate That He Wanted to Discharge His Attorney and Substitute Another Attorney

Defendant claims he requested substitute counsel at the beginning of the sentencing hearing. He contends he informed the trial court that he wanted new counsel to investigate claims of ineffective assistance of counsel (IAC) to support a motion for new trial. He argues that the court committed reversible error when it failed to hold a *Marsden* hearing to give him the opportunity to state the specific reasons for wanting substitute counsel. He further claims that the court's denial of his *Marsden* motion denied him due process and a fair trial. The People contend that defendant never indicated he wanted substitute counsel; thus, no *Marsden* hearing was needed. We agree with the People.

A. Relevant Background

At the outset of the sentencing hearing, defense counsel informed the court that defendant wished to address it immediately. Defendant then stated, "Yes, your Honor. I would like, um, to um, if it's possible, to put a motion in for new trial, and it would be for ineffective counseling." The court responded, "Okay. Let me respond to that first by reading your right to appeal because that's the appropriate place to do this, and we can get transcripts to document your argument." The court proceeded to explain his rights on appeal, including that, if he was unable to hire an attorney, the appellate court would appoint counsel to represent him at no cost. Defendant replied, "Yes, sir. I would . . . need, um, counseling because the ineffective assistance of counseling would be—." The

court interjected, “Well, that’s one of the bases you can bring up.” Defendant said, “Okay.” The court told him that all his review rights were reserved as long as he filed a timely notice of appeal, and that he had 60 days to do so, to which defendant said, “Right.” The court then proceeded with the sentencing hearing and heard statements on defendant’s behalf.

At the end of the statements, defendant raised his hand and said, “May I speak before the sentencing here?” The court noted that it still had to hear his *Romero*⁴ motion. Nonetheless, defendant proceeded to speak. He apologized to the court for his behavior. He also apologized to his mother and everyone his actions affected, and he asked for forgiveness. Defendant then mentioned the videos in the case and said, “[O]n the video’s part, that’s—that’s the part I wanted to—to, um, for the motion, was the videos, if I would have seen them all . . . it would have been a fair opportunity to have seen them all, so—.” The court responded, “All right. I took your—your first comments, wanting to appeal, in probably 95 percent of the cases where there is a conviction, they want to appeal, and that’s why I read you those rights So, I did not take this as a *Marsden* motion, but it was basically wanting to appeal the judgment, so you have that right. [¶] You want to go to *Romero* then?”

The court proceeded to address the *Romero* motion. It heard argument from counsel and engaged defendant in a dialog concerning his past, as well as his conduct in the current incident. The court denied the *Romero* motion and went on to sentence

⁴ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

defendant. At the close of the proceedings, defendant asked the court if he could respond to the comments the court made about the sadness of this case. Defendant tried to justify some of his past convictions and added that there were no weapons used in the instant case.

B. Defendant Did Not Request Substitute Counsel

Defendant claims that when he told the court he wanted “to put a motion in for new trial, and it would be for ineffective counseling,” this request “was obviously a *Marsden* motion.” We disagree with defendant’s characterization of his request.

“[C]riminal defendants are entitled under the Constitution to the assistance of court-appointed counsel if they are unable to employ private counsel.” (*Marsden, supra*, 2 Cal.3d at p. 123.) “A defendant is entitled to have appointed counsel discharged upon a showing that counsel ‘ “ ‘is not providing adequate representation’ ” ’ or that counsel and defendant ‘ “ ‘have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.’ ” ’ ” (*People v. Earp* (1999) 20 Cal.4th 826, 876.) A trial court has a “duty to permit a defendant to state his reasons for dissatisfaction with his attorney arises when the defendant in some manner moves to discharge his current counsel.” (*People v. Lucky* (1988) 45 Cal.3d 259, 281 (*Lucky*).) “Although no formal motion is necessary, there must be ‘at least *some clear indication* by defendant that he wants a substitute attorney.’ ” (*People v. Mendoza* (2000) 24 Cal.4th 130, 157, italics added; see *Lucky*, at p. 281, fn. 8.)

The record in this case does not reveal a clear indication by defendant that he wanted to substitute his attorney. He informed the court that he wanted “to put a motion

in for new trial” for ineffective counseling. Thus, it appears he framed the matter as a motion for new trial. He did not mention anything about discharging his current counsel or wanting substitute counsel.⁵ The court apparently understood his request as stating that he wanted to appeal the judgment. Thus, it explained his rights on appeal. Subsequently, the court clarified that it did not understand defendant’s request to be a *Marsden* motion. We note that defendant was familiar with *Marsden* motions, since he made a pretrial *Marsden* motion in this case and was properly heard by the court. Significantly, defendant did not correct the court’s understanding of his request. Rather, he responded with “[o]kay,” and “[r]ight,” when the court told him he could raise IAC on appeal, and that he had 60 days to file.⁶

Defendant points to the statement where he said, “Yes, sir. I would . . . need, um, counseling because the ineffective assistance of counsel would be—” The court interjected with the following: “Well, that’s one of the bases you can bring up.” When read in context, defendant indicated he would need counseling in response to the court’s explanation of his rights on appeal, including that the appellate court would appoint

⁵ Although not entirely clear, defendant could have been moving for the appointment of *separate* counsel for the purposes of preparing a motion for a new trial. (See *People v. Dickey* (2005) 35 Cal.4th 884, 918 [the defendant moved for the appointment of separate counsel to represent him in the preparation of a motion for new trial with likely allegations that counsel acted incompetently in the guilt phase].)

⁶ Defendant asserts that the court “presumably knew” that if he wanted to present an IAC claim, “appeal was probably not the best way to do it.” While IAC claims are more appropriately decided in a habeas corpus proceeding, parties do raise IAC claims on appeal. (See *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267; *People v. Ledesma* (2006) 39 Cal.4th 641, 745-746.)

counsel to represent him if he was unable to hire an attorney. Thus, contrary to defendant's claim that his response could only be understood as a request for substitute counsel, it could reasonably be read as a request to have an attorney appointed on appeal to counsel him.

Even if we assume defendant's initial remark constituted a request to substitute his present counsel, his subsequent conduct indicated that he abandoned any such request. (See *People v. Vera* (2004) 122 Cal.App.4th 970, 981-982 [a court found that the defendant abandoned his unstated complaints about his counsel by not accepting its invitation to present them at a later hearing].) When the court told defendant it did not understand his request to be a *Marsden* motion, and then asked if he wanted to proceed to the *Romero* motion, defendant did not object. Trial counsel continued to represent him through the penalty phase, without incident. Thus, it does not appear that defendant believed his counsel was providing inadequate representation.

We further note that defendant asked to speak before he was sentenced, and then simply apologized to the court and others for his conduct. After he was sentenced, he again asked to speak and proceeded to justify his past crimes and inform the court that he did not use weapons in the current case. Therefore, defendant had ample opportunity to ask for substitute counsel again, or at least attempt to explain why he wanted his counsel discharged. However, he did not raise any *Marsden* issue. Such conduct indicates that he abandoned any alleged claim. (See *People v. Jones* (2012) 210 Cal.App.4th 355, 362 [court found the defendant had the duty to bring his *Marsden* motion to the trial court's

attention in court, after having previously filed a handwritten motion; his failure to do so constituted abandonment of his claim].)

Defendant finally argues that the court's error in failing to hold a *Marsden* hearing cannot be considered harmless "because the record does not show what [he] would have said if given the opportunity." He then proceeds to raise several potential reasons he could have been dissatisfied with counsel. He asserts that "the reasonable inference [from the record] is that his reasons concerned counsel's advice about great bodily injury, force likely to produce great bodily injury, and the legal significance of the uncontested video evidence." He cites his comment to the court about the videos and states that the comment "might have meant that, before the trial, he did not understand the legal significance of what he was seeing." He also contemplates the reasons for his rejection of a 15-year offer on the first day of trial and asserts that "[t]he question arises whether counsel provided [him] correct advise about [great bodily injury] and force likely." Defendant's argument is pure speculation.

We conclude the record does not reveal a clear indication by defendant that he wanted to substitute his attorney. Contrary to his characterization of what occurred below, the court did not deny his *Marsden* motion without allowing him to state his reasons for wanting new counsel, and he has not shown he was denied due process or a fair trial. Therefore, reversal on these grounds is not required.

II. The Matter Should be Remanded for Resentencing

Defendant admitted two prior serious felony convictions (§ 667, subd. (a)), and the court imposed five years on each of those enhancements. He now contends that the

matter should be remanded for resentencing for the court to exercise its discretion pursuant to SB 1393. The People concede, and we agree.

A. Sentencing

The court sentenced defendant on January 29, 2018. As to the determinate sentence, the court named count 1 as the principal count and imposed three years, doubled pursuant to the strike; count 6 was the subordinate term, and the court imposed four months, doubled pursuant to the strike, or eight months. The court then imposed one year each on the six prison priors. (§ 667.5, subd. (b).) As to the indeterminate component, the court imposed 25 years to life on count 2, plus five years on each of the two serious prior felony conviction enhancements (§ 667, subd. (a)), and one year each on four of the prison priors (§ 667.5, subd. (b)), for 25 years to life plus 14 years. The court similarly imposed 25 years to life, “plus the 5 plus 5 plus 4 or 14” on both counts 3 and 4, but it stayed the entire sentence on count 3, pursuant to section 654. Therefore, the court pronounced the total sentence as 12 years eight months on the determinate component and 78 years to life on the indeterminate component.

B. The Matter Should Be Remanded

On September 30, 2018, the Governor signed SB 1393 which, effective January 1, 2019, amended sections 667, subdivision (a), and 1385, subdivision (b), to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.) (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971.) Defendant contends SB 1393 applies retroactively to all cases or judgments of conviction in which a five-year term was imposed at sentencing, based on a

prior serious felony conviction, provided the judgment of conviction was not final when SB 1393 became effective on January 1, 2019. Thus, the matter should be remanded to the trial court to allow it to exercise its discretion to dismiss his prior serious felony enhancement, pursuant to SB 1393. The People concede, and we agree, that SB 1393 applies here and that remand is necessary.

However, we observe that, in sentencing defendant, the trial may have double-counted the prison priors with respect to the determinate sentence and the indeterminate sentence. It also appears that the court imposed the prior serious felony conviction enhancements on the indeterminate terms and doubled-counted them, as well. In other words, it appears that the court sentenced defendant to more years than it should have.

DISPOSITION

The matter is remanded to the trial court for resentencing in accordance with the views expressed in this opinion. In all other respects, the judgment is affirmed.

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McKINSTER

Acting P. J.

We concur:

MILLER
J.

RAPHAEL
J.